2009

Hi-Country Estates Homeowners Association v. Foothills Water Company : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation, Plaintiff, v. BAGLEY & COMPANY, J. RODNEY DANSIE, and GERALD BAGLEY, Defendants.	**BRIEF OF APPELLEE**
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Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Stephen Roth

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STATEMENT OF JURISDICTION

The Utah Supreme Court had original appellate jurisdiction of this appeal under Utah Code section 78A-3-102(3)(j). Pursuant to its authority under Utah Code section 78A-3-102(4), the Utah Supreme Court transferred the case to this Court on July 10, 2009. This Court has jurisdiction under Utah Code section 78A-4-103(2)(j).

STATEMENT OF ISSUES / STANDARDS OF REVIEW

Appellee does not agree with Appellants' statements of the issues and the standard of review. Pursuant to rule 24(b)(1) of the Utah Rules of Appellate Procedure, Appellee provides the following statements:

Issue: Where the district court's final judgment was affirmed on all issues by the Utah Court of Appeals, did the district court correctly conclude that it lacked authority upon remittitur to modify the final judgment?

Standard of Review: Contrary to Appellants' statement of the standard of review, the clearly erroneous standard applies when an appellate court is reviewing questions of fact. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). This case does not present questions of fact. Rather, it presents pure questions of law, as it is a review of the district court's legal determinations. *See id.* (defining legal determinations as "rules or principles uniformly applied to persons of similar qualities and status in similar circumstances"). Accordingly, the proper standard of review is correctness. *Id.* at 936 ("[A]ppellate review of a trial court's determination of the law is usually characterized by the term 'correctness.'").

DETERMINATIVE PROVISIONS

There are no determinative provisions.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This appeal is a continuation of a dispute that began in 1985, when Hi-Country Estates Homeowners Association ("**the Association**") brought an action against multiple parties to quiet title to a water system. In the nearly 25 years since the dispute began, the Association and Rodney Dansie affiliated entities (collectively, "**the Dansies**") have litigated numerous claims and counterclaims related to the water system. Not only does this dispute have an extensive history in the district court, but it has also produced six appellate court opinions (three in the Utah Supreme Court and three in this Court).

This appeal centers on a Final Judgment that was entered by the district court in 2006. In an attempt to end the long-running litigation between the parties, the district court requested that the parties present all remaining issues so that a final judgment could be entered. After extensive briefing and a trial on all remaining issues, the district court entered its Final Judgment on January 5, 2006 ("**Final Judgment**"). Both parties appealed the Final Judgment to this Court. In March 2008, this Court issued its opinion, in which this Court "affirm[ed] the trial court on all issues." *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, ¶ 24, 182 P.3d 417. The Association filed a Petition for Rehearing with this Court, which was denied. The

Dansies did not request a rehearing. Both parties then filed Petitions for Writ of Certiorari with the Utah Supreme Court, which were denied. This Court then remitted the case to the district court.

Shortly after the case was remitted to the district court, the Dansies filed a "Motion to Modify Final Judgment." The Dansies asked the district court to significantly change the Final Judgment based on a footnote in this Court's opinion, despite the fact that this Court had "affirm[ed] the trial court on all issues." *Id.* The district court concluded that it had no authority to modify the Final Judgment in the face of this Court's unequivocal affirmance of the entire Final Judgment. The Dansies now appeal the district court's order denying the motion to modify.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS BELOW[1]

District Court's Final Judgment

1. In February 2006, the parties stipulated to, and the district court certified, all remaining issues in this longstanding dispute. (R. Vol. 13, p. 1554-55.)

2. Following a trial on the remaining issues, the district court entered its Final Judgment on January 5, 2006. (R. Vol. 14, p. 1764-73.)

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[1] This case has an extensive factual and procedural history going back almost 25 years. Because this appeal is narrow and relates only to the proceedings from the last few years, this brief contains only the facts and procedural history pertinent to this appeal. If the Court desires a more detailed history in order to understand the background of this case, it is invited to review the statement of facts in *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 863 P.2d 1, 2-6 (Utah Ct. App. 1993) or the statement of facts contained in the Association's brief in the most recent appeal (Appellate Docket Number 20060139). *See* Brief of Appellee dated March 28, 2007, pages 6-27.

3. In the Final Judgment, the district court held that "[t]he Dansies are entitled to receive water from the Association's Water System only upon payment of the Dansies' *pro rata* share of the Association's costs of power, chlorination, water testing and transportation." (R. Vol. 14, p. 1769.) Additionally, the district court held that the Dansies had "the right to receive 55 additional water connections from the Association, but only if the Dansies pay the Association for those connections at the Association's usual charge for each such connection." (R. Vol. 14, p. 1767.)

Utah Court of Appeals' Opinion

4. Both parties appealed the Final Judgment to this Court. (Appellate Docket Number 20060139.)

5. In the Dansies' opening brief, the first issue presented to this Court for review was "[w]hether the trial court erred in holding that although the Well Lease provides that the Dansies are entitled to 55 water connections and up to 12 million gallons of water per year without charge, the Dansies must first pay for the connections as well as the Dansies' *pro rata* share of the transportation costs." (Brief of Appellants dated January 26, 2007, page 1. A copy of this page is attached hereto as Tab A.)

6. Much of the briefing by both parties focused on this issue. (*See, e.g.*, Brief of Appellants dated January 26, 2007, pages 13-18; Brief of Appellee dated March 28, 2007, pages 35-39; Reply Brief of Appellants dated June 21, 2007, pages 18-22; Reply Brief of Appellee dated August 29, 2007, pages 2-9.)

7. In oral argument before this Court, the first issue raised by the Dansies' counsel was "whether or not the Dansies are required to pay the transportation costs

associated with the lease provision that says they're entitled to 12 million gallons of water per year and the 55 hookups." (A recording of the oral argument is available online at http://www.utcourts.gov/courts/appell/streams/index.cgi?mon=200711.)

8. On March 27, 2008, this Court issued its opinion. *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, 182 P.3d 417.

9. In the opening paragraph of the opinion, this Court held that the district court's Final Judgment was affirmed. *Id.* ¶ 1 ("We affirm.").

10. In the final paragraph of the opinion, this Court again stated that it was affirming the district court's Final Judgment in its entirety. *Id.* ¶ 24 ("We therefore affirm the trial court on all issues.").

Petitions for Rehearing and Writ of Certiorari

11. The Association filed a Petition for Rehearing, requesting that this Court reconsider its holding that the Well Lease was not unconscionable. (Appellee and Cross-Appellant's Petition for Rehearing, dated April 10, 2008.) The Association's Petition for Rehearing was ultimately denied by this Court.

12. The Dansies did not file a Petition for Rehearing.

13. Both parties filed Petitions for Writ of Certiorari with the Utah Supreme Court. (Appellate Docket Number 20080538.) The Utah Supreme Court denied both Petitions. (R. Vol. 15, p. 1972.)

14. Following the Utah Supreme Court's denial of the Petitions, this Court remitted the case to the district court. (R. Vol. 15, p. 1988-89.)

District Court's Order Denying Motion to Modify Final Judgment

15. Upon remittitur, the Dansies filed a Motion to Modify Final Judgment with the district court. (R. Vol. 15, p. 2000-01.)

16. The Dansies argued that, based upon paragraph 12 and footnote 2 of this Court's opinion, the district court should significantly modify the findings and conclusions of the Final Judgment. (R. Vol. 15, p. 2003-09.)

17. The district court denied the Dansies' motion to modify the Final Judgment. (R. Vol. 15, p. 2082-87.)

18. In the Order Denying Motion to Modify Final Judgment, the district court noted that there was "no ambiguity whatsoever" in this Court's language that it had affirmed the Final Judgment on all issues and that the Dansies' request "would result in a very different trial court order than the one the Court of Appeals affirmed." The district court concluded that it did not have the authority "to interpret the opinion so broadly in the face of the unequivocal affirmance." (R. Vol. 15, p. 2086.)

19. The Dansies filed a Notice of Appeal, seeking review of the district court's Order Denying Motion to Modify Final Judgment. (R. Vol. 15, p. 2097-98.)

SUMMARY OF THE ARGUMENT

The district court properly denied the Dansies' motion to modify the Final Judgment. The district court correctly held that it lacked the power to modify the Final Judgment, which had been affirmed on all issues by this Court. This Court's unequivocal affirmance of the Final Judgment precluded further review by the district court, and the

district court had only the power to enforce the Final Judgment as affirmed. Furthermore, even if the Dansies' motion to modify had been treated as a motion to reconsider, it would still have been properly denied by the district court. Additionally, any modification of the Final Judgment would have violated the mandate rule. For these reasons, this Court should affirm the district court's Order Denying Motion to Modify Final Judgment.

This Court should not recall its mandate and modify its prior opinion. This Court cannot recall its mandate because no Utah rule of procedure allows a recall of mandate and because no Utah appellate court has ever held that it has the "inherent power" to recall a mandate. But even if the Court does have the power to recall a mandate, this case is devoid of any exceptional circumstances that warrant the extraordinary relief requested by the Dansies. The Dansies had plenty of opportunity to utilize the rehearing or certiorari procedures to raise any alleged inconsistencies in this Court's prior opinion, but they failed to do so. Additionally, there is no manifest injustice to be avoided in this case because the Dansies will be in the same position regardless of whether or not this Court recalls its mandate and modifies its prior opinion. Accordingly, this Court should deny the Dansies' request that the Court recall its mandate.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF THE MOTION TO MODIFY THE FINAL JUDGMENT.

The Dansies attempt to turn this latest appeal into something that it is not. This is an appeal of the district court's Order Denying Motion to Modify Final Judgment. *See* Notice of Appeal (R. Vol. 15, p. 2097-98) (stating that the Dansies "hereby appeal[] to the Court of Appeals from the Order Denying Motion to Modify Final Judgment signed by the Honorable Stephen Roth . . . on April 21, 2009"). Nevertheless, the Dansies dedicate only one paragraph of their brief (*see* Brief of Appellants, pages 11-12) to the true issue of this appeal, i.e., whether the district court was correct in denying the Dansies' motion to modify the Final Judgment. The Dansies use the remainder of their brief to, in essence, attempt to re-appeal this Court's prior opinion. The Court should not take the bait. Instead, it should limit its review to the Order denying the Dansies' motion to modify and resist the Dansies' urgings to "redo" a prior appellate decision.

As discussed below, the district court's denial of the Dansies' motion to modify was correct. The district court properly held that it lacked authority to modify the Final Judgment in the face of this Court's unequivocal affirmance on all issues. But even if the district court did have authority to modify the Final Judgment, modification would still have been inappropriate in light of this Court's opinion.

A. The District Court Correctly Held It Lacked Authority to Modify the Final Judgment Affirmed on Appeal.

The district court concluded that it did not have the authority to modify the Final Judgment in the face of this Court's "unequivocal affirmance" of the Final Judgment in the prior appeal. The district court therefore denied the Dansies' motion to modify the Final Judgment upon remittitur. The district court's holding was correct and is soundly based on Utah law because (1) this Court's affirmance precluded further review; (2) the district court had only the power to enforce the Final Judgment as affirmed; (3) even if the motion to modify had been treated as a motion to reconsider, it would still have been denied; and (4) modification of the Final Judgment would violate the mandate rule.

First, the district court's holding is in harmony with the Utah Supreme Court's decision in *DeBry v. Cascade Enters.*, 935 P.2d 499 (Utah 1997). In *DeBry*, the Utah Supreme Court had previously affirmed a judgment in favor of the defendants based on DeBry's failure to pay a promissory note. *Id.* at 500. On remand to the district court, DeBry again asked for a setoff and recalculation of interest due on the promissory note. *Id.* at 501. The trial court rejected DeBry's motion, and DeBry again appealed to the Supreme Court. *Id.* The Supreme Court ruled that the trial court had correctly rejected DeBry's motion:

> [O]n remand . . . the trial court had no authority to modify the judgment this Court had affirmed, except to the extent ordered by this Court and in conformity with its mandate. An unqualified affirmance is a final settlement of the applicable law; it settles the law of the case and precludes further appeals on the issues pertaining to that judgment . . . . The affirmance of a judgment precludes a further attack on that judgment in a subsequent appeal.

Id. at 502 (internal citations omitted).[2]

The Supreme Court's holding in *DeBry* clearly supports the district court's conclusion in this case that it did not have authority to modify the Final Judgment "in the face of the unequivocal affirmance." (R. Vol. 15, p. 2086.) It also supports the Association's position that the Dansies should not be permitted to attack the affirmance in this subsequent appeal. Given the clear and unequivocal affirmance by this Court, modification of the Final Judgment was not warranted or even permissible.

Second, under Utah law, "[a]n affirmance is the confirmation and ratification by an appellate court of a judgment, order, or decree of a lower court brought before it for review." *Schoney v. Memorial Estates, Inc.*, 863 P.2d 59, 61 (Utah Ct. App. 1993). Indeed, "[f]rom time immemorial, [appellate courts] have adhered to the basic and elementary rule that . . . affirmance . . . declares that the trial judgment was correct as if there had been no appeal," and "[u]pon issuance of [the] mandate, the trial court simply proceeds to enforce the final judgment." *Collins v. Acree*, 614 So. 2d 391, 392 (Miss. 1993). This Court affirmed the district court's Final Judgment on all issues and did not express any directions or intent that modification of the Final Judgment was necessary or appropriate. The district court had only the power to enforce the Final Judgment as affirmed by this Court. Thus, the district court correctly held that it lacked authority to modify the Final Judgment.

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[2] Affirmance precludes attack whether the Court of Appeals panel on the subsequent appeal is the same or different. *See State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993) ("[S]tare decisis has equal application when one panel of a multi-panel appellate court is faced with a prior decision of a different panel.").

Third, as noted by the district court, if and to the extent the Dansies' motion to modify could be construed as a motion to reconsider the Final Judgment, such motion would still have been denied. (*See* R. Vol. 15, p. 2085-86.) The district court cited to *Gillette v. Price*, in which the Utah Supreme Court "absolutely reject[ed] the practice of filing postjudgment motions to reconsider," which "are not recognized in either the Utah Rules of Appellate Procedure or the Utah Rules of Civil Procedure." 2006 UT 24, ¶¶ 1, 6, 135 P.3d 861. The *Gillette* court also stated that "[i]n our system, the rules provide the source of relief available. . . . [and] when a party seeks relief from a judgment, it must turn to the rules to determine whether relief exists, and if so, direct the court to the specific relief available." *Id.* ¶ 8.

The district court's holding on this point is sound. The Dansies' were unable to point the district court to any rule under which they were entitled to the relief they sought, which was a modification of the Final Judgment affirmed by this Court.[3] The district court could not, should not, and did not grant the Dansies a disfavored motion that has no basis in the rules of procedure.

Finally, the district court's denial of the Dansies' motion to modify the Final Judgment was correct because modifying the Final Judgment would have violated the mandate rule. Utah courts have "long recognized that branch of the law of the case doctrine known as the mandate rule." *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583. "The mandate rule 'dictates that pronouncements of an appellate court on

[3] Similarly, as discussed in Section II.A of this brief, the Dansies are unable to point to any rule under which they are entitled to the relief they seek from this Court, which is a recall of mandate and modification of this Court's prior opinion.

legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case.'" *Id.* (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1037-38 (Utah 1995)). "'The mandate rule . . . binds both the district court and the parties to honor the mandate of the appellate court.'" *Id.* (quoting *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 28, 196 P.3d 588). "'Where a judgment or decree is affirmed or reversed and remanded with directions to enter a particular judgment, the trial court may not permit amended or supplemental pleadings to be framed to try rights already settled.'" *Id.* (quoting *Street v. Fourth Judicial Dist. Court*, 191 P.2d 153, 158 (Utah 1948)). "The mandate rule is justified. Without it, 'considerable inefficiencies would result if parties were free to relitigate after remand issues decided in an earlier ruling of this court.'" *Id.* ¶ 13 (quoting *Gildea v. Guardian Title Ins. Co.*, 2001 UT 75, ¶ 9, 31 P.3d 543). "The rule is also 'not only reasonable, but necessary, if litigation is ever to come to an end.'" *Id.* (quoting *Street*, 191 P.2d at 158); *see also Thurston*, 892 P.2d at 1039 (stating that the mandate rule "rests on good sense and the desire to protect both court and parties against the burdens of repeated reargument by indefatigable diehards" (internal quotation marks and citation omitted)).

The mandate rule clearly applies. This Court affirmed the Final Judgment on all issues, and this Court's mandate was binding on the district court upon remittitur. The Dansies' motion to modify the Final Judgment was an attempt to relitigate issues that had already been decided and affirmed by this Court. The district court properly rejected the Dansies' motion to modify in the interest of bringing finality to litigation that has been ongoing for almost 25 years.

The Dansies, nevertheless, argue that the district court had the right and power to amend the Final Judgment "in order to prevent manifest injustice." Brief of Appellant, pages 11-12. As support, the Dansies cite to a Pennsylvania case for the proposition that "a trial court may deviate from the strict language of a remand in order to prevent a grave injustice." Brief of Appellant, page 11 (citing *In re Estate of Rochez*, 606 A.2d 563 (Pa. Commw. Ct. 1992)). The Pennsylvania case is, however, neither controlling nor persuasive in the present case. In *Rochez*, the Pennsylvania Commonwealth Court issued a decision that was "premised upon [an] erroneous assumption." 606 A.2d at 565. On remand, the trial court refused to enforce the decision as written, and the case was again appealed to the Commonwealth Court. *Id.* The Commonwealth Court held that the trial court was correct in refusing to enforce the appellate decision because the decision had been "based upon palpably erroneous facts." *Id.* at 566. But in the present case, this Court's opinion was not based on erroneous assumptions or facts, and there is no "manifest injustice" to be avoided.[4] Thus, the claimed exception to the mandate rule does not apply. Rather, "the trial court [was] duty bound to strictly comply with the mandates of this Court." *Id.* at 566-67.

In sum, the district court's holding that it lacked authority to modify the Final Judgment was correct. Utah law clearly provides that the district court could not have modified the Final Judgment, which had been unequivocally affirmed on all issues by this Court. The district court had only the authority to enforce the Final Judgment as

[4] Section II.B of this brief presents a more detailed analysis of why there is no "manifest injustice" at play in this case.

affirmed. The district court also correctly noted that even if the motion to modify was treated as a motion to reconsider, it would still be denied. Finally, the district court's decision was correct in light of the mandate rule and the strong interest in judicial finality upon which the mandate rule is founded. For these reasons, this Court should affirm the district court's denial of the Dansies' motion to modify the Final Judgment.

B. Even If the District Court Had Authority to Modify the Final Judgment, This Court's Opinion Did Not Support Modification.

Even assuming that the district court somehow had the authority to modify the final judgment, denial of the motion to modify was correct because this Court's prior opinion did not support modification. When looking at the opinion in its totality, it becomes clear that (1) if this Court had intended to reverse the district court, it would have done so explicitly; (2) footnote 2 can be—and should be—read consistent with the affirmance; and (3) even if there is an inconsistency, the mandate governs.

First, notwithstanding this Court's unequivocal affirmance on all issues, the Dansies assume that this Court intended modification or partial reversal of the Final Judgment, but mistakenly omitted that intent from its directive. This assumption is not only speculative, but is untenable given the briefs before this Court and given the opinion as a whole. The Dansies raised only four issues in the prior appeal, and the very first one was "[w]hether the trial court erred in holding that although the Well Lease provides that the Dansies are entitled to 55 water connections and up to 12 million gallons of water per year without charge, the Dansies must first pay for the connections as well as the Dansies' *pro rata* share of the transportation costs." *See* Tab A. This issue was

extensively briefed in each of the four briefs before this Court and was the first issue raised by the Dansies' counsel in oral argument. If this Court had intended to reverse or modify the Final Judgment on this issue, it is reasonable to assume that it would have explicitly stated that intent in its opinion. But such language is nowhere to be found. The opinion does not say "affirmed as modified by this opinion." It does not say "affirmed in part and reversed in part." Indeed, nowhere in the Opinion does this Court assign any error to the district court's Final Judgment.

There are significant hazards associated with implying an appellate directive different from the actual stated directive in an opinion. For example, in *Madsen v. Madsen*, 1 P.2d 946 (Utah 1931), the Utah Supreme Court had ruled in an earlier case that "the judgment will have to be set aside," and that the trial court should "sustain the special demurrer to the first, second, and third causes of action." *Id.* at 946. On remand, the trial court inferred that the opinion "was, in effect, an affirmance of the judgment as to the fourth cause of action" and awarded the damages for that claim established at the pre-appellate trial. *Id.* at 948. On the second appeal, the Utah Supreme Court held that the words "'[t]he judgment will have to be set aside' . . . can only mean that the judgment is set aside, vacated, and annulled, and, having been thus swept from existence, the lower court has no power to breathe into any part of it the breath of life." *Id.* Similarly, in this case, this Court "affirm[ed] the trial court on all issues," which can only mean that it did not reverse or modify the district court's ruling on any issue.

Indeed, the issue of implied appellate directives is fraught with peril. The burdens of "repeated reargument by indefatigable diehards," *Thurston v. Box Elder County*, 892

P.2d 1034, 1039 (Utah 1995), are likely to be felt by litigants and courts alike if parties dissatisfied with their appellate outcomes are allowed to ignore the redress available to them by petitions for rehearing or certiorari in the appellate courts, and instead wait until the matter has been remitted to the district court to scour the appellate decision for any scrap of language that may arguably indicate that the appellate court could not possibly have meant what it said in the directive.

The issue of whether the district court correctly held that the Dansies were required to pay the connection fees and their pro rata share of costs was squarely before this Court. Indeed, it was the foremost issue in the appeal. Had this Court intended to reverse the district court on this important issue, it would have done so explicitly in its opinion and/or mandate, and not implicitly through a footnote.

Second, this Court's opinion can be read in a way that there is no inconsistency between the body of the opinion and the mandate. Throughout their brief, the Dansies cling to the assumption that there is an inconsistency between footnote 2 and the ultimate mandate of this Court.[5] Nevertheless, the opinion can be—and should be—read in a way that there is no inconsistency.

A court should be hesitant to conclude that there is an inconsistency and should make every effort to reconcile the body of the opinion to the directive. *See Culbertson v. Bd. of County Comm'rs*, 2001 UT 108, ¶ 15, 44 P.3d 642 (noting that interpreting court

[5] It should be noted that the Dansies took the opposite position before the district court when they petitioned for a modification of the Final Judgment. *See* R. 2056 ("There is no inconsistency between paragraph 12 and footnote 2, which contain the reasoning of the Court of Appeals, and its ultimate affirmance of the trial court.").

judgments is governed "under the rules that apply to other legal documents"); *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990) ("Each . . . provision is to be considered in relation to all others."). The Utah Supreme Court's reversal of the *Amax* decision illustrates this point. On review of the Court of Appeals' decision, the Supreme Court explained that there was no inconsistency between its directive to apply a certain valuation statute and the constitutional principles discussed in the body of the opinion because the statute itself only applied to property valued in a certain way. *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 874 P.2d 840, 842–43 (Utah 1994). Similarly, footnote 2 can be reconciled with the overall opinion and its ultimate directive affirming the district court on all issues.

When viewed in concert with the remainder of the opinion, the interpretive purpose of footnote 2 becomes clear. Footnote 2 occurs within the opinion's discussion of why the well lease agreement entered into by the parties' predecessors-in-interest ("**Well Lease Agreement**") is not void as a matter of public policy. *Hi-Country Estates Homeowners Ass'n*, 2008 UT App 105, ¶ 12, 182 P.3d 417. This Court held that the Utah Public Service Commission's ("**PSC**") lack of "current" jurisdiction over the Association rendered a 1986 PSC Order and the statutes governing public utilities insufficient to invalidate the Well Lease Agreement on public policy grounds. *Id.* After discussing the public policy argument, this Court proceeded to discuss the issue of unconscionability. *Id.* ¶¶ 14–20. Footnote 2 established that, for purposes of the unconscionability discussion to follow, the Court of Appeals would "*interpret* the Dansies' rights and obligations under the Well Lease according to its plain language." *Id.*

¶ 12 n.2 (emphasis added). This Court was saying, in essence, that it would not assess the issues of public policy and unconscionability based on the Well Lease Agreement as modified by the 1986 PSC Order, but would assess these issues based on the unmodified Well Lease Agreement. This Court did not, however, say that the district court erred in imposing the conditions that it did, and such an assignment of error should not and cannot be implied. In sum, paragraph 12 and footnote 2 of this Court's prior opinion can—and should—be read in a way that is consistent with its mandate that the Final Judgment was affirmed in its entirety.

Finally, even assuming, *arguendo*, that footnote 2 is inconsistent with this Court's affirmance—as alleged by the Dansies—the directive of "affirmed on all issues" governs. This Court has held that "[w]here the language used in the body of an appellate opinion conflicts with directions on remand, the latter controls." *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 848 P.2d 715, 718 (Utah Ct. App. 1993), *rev'd on other grounds* 874 P.2d 840 (Utah 1994). This rule is sensible as it is much less likely that an error would be made by an author and missed by a panel of reviewing judges in the ultimate directive of an opinion than in the body of that opinion. Thus, if a directive is an unequivocal affirmance on all issues, the directive governs over any language in the opinion that could be construed by a party as a partial reversal.

But contrary to this Court's holding in *Amax*, the Dansies cite a Missouri case in support of their claim that a trial court can exceed the scope of the mandate. Brief of Appellant, page 12 (citing *Frost v. Liberty Mut. Ins. Co.*, 813 S.W.2d 302 (Mo. 1991)). That case is not only contrary to the Utah law discussed above, but it is also

distinguishable from this case. In *Frost*, the Missouri Court of Appeals remanded a case with an incomplete directive. 813 S.W.2d at 304. In its opinion, the Court of Appeals held that the trial court should have granted both a motion to intervene and a motion to vacate the judgment. *Id.* 304. The final paragraph of the opinion, however, directed the trial court to grant only the motion to intervene. *Id.* When the case was remitted, the trial court granted the motion to intervene and the motion to vacate the judgment. *Id.* at 303-04. The case was appealed to the Missouri Supreme Court, with the appellant arguing that the trial court exceeded the Court of Appeals' mandate. *Id.* at 304. The Missouri Supreme Court held, however, that the final mandate was merely incomplete and that the entire mandate could be found within the opinion. *Id.* at 304-05. Thus, the trial court had correctly granted both motions. *Id.* In the present case, the Dansies do not allege that this Court's mandate of "affirmed on all issues" is incomplete. Rather, the Dansies argue that the mandate is an outright error and is wholly contradictory to the language of the opinion. Thus, this is not a case of an incomplete mandate, and the language of *Frost* does not apply.

In sum, even assuming that the district court did have the authority to modify the final judgment, the motion to modify should still have been denied because this Court's opinion did not support modification. Had this Court intended to reverse the district court, it would have done so explicitly, and not (as alleged by the Dansies) implicitly through a footnote. Furthermore, there is no inconsistency in the opinion, as footnote 2 can and should be read consistent with the affirmance. Finally, even if there is an inconsistency, the mandate affirming on all issues governs. For these reasons, this Court

should affirm the district court's denial of the Dansies' motion to modify the Final Judgment.

II. THIS COURT SHOULD NOT RECALL ITS MANDATE.

As mentioned in Section I, the true issue before this Court is whether the district court correctly denied the Dansies' motion to modify the Final Judgment, and this Court should limit its review to this issue. Nevertheless, if and to the extent this Court chooses to entertain the Dansies' request that the Court recall its mandate, this Court should deny the request. Utah appellate courts have never explicitly held that a recall of mandate is recognized in Utah and have expressed unwillingness to grant a recall of mandate. Additionally, even if this Court has the power to recall a mandate, exercising that power is not justified here because the Dansies have not met the high burden for a recall of mandate.

A. Utah Courts Have Been Reluctant to Recall a Mandate.

The Dansies cite to cases from other jurisdictions (mostly federal courts) to support their assertion that this Court can and should recall its mandate. The Dansies do not cite to any Utah precedent to support their position. Indeed, there is no such support. There is no rule of procedure that allows a recall of mandate[6] and, unlike the courts cited

[6] The nonexistence of a Utah rule of procedure permitting a recall of mandate is a significant distinguishing factor for a case cited in the Dansies' brief. In *People v. McAfee*, the Colorado Court of Appeals' decision to allow a recall of mandate was based largely on the fact that a Colorado rule of procedure specifically provides for recalls of mandate. 160 P.3d 277, 279 (Colo. Ct. App. 2007) ("'The Supreme Court, the Court of

in the Dansies' brief, no Utah appellate court has ever specifically held that it has the "inherent power" to recall a mandate and modify an opinion following remittitur. The Association's research shows that a recall of a mandate is briefly mentioned in only two Utah cases, neither of which lend support to the Dansies' arguments.

In *Tucker v. State*, Tucker appealed a district court's dismissal of his petition for extraordinary relief. 2005 UT App 28, 2005 WL 121439 (unpublished) (attached as Tab B). This Court reversed and remanded the case with respect to one claim. *Id.* On remand, the district court denied this final claim on summary judgment, and Tucker appealed the district court's decision to this Court. *Id.* Tucker also filed a "Motion to Recall of Mandate for Good Cause," wherein he requested this Court to set aside its first decision. *Id.* This Court denied the motion, concluding that "we lack jurisdiction to set aside our previous decision and do not consider the motion filed in this appeal from a completely separate decision." *Id.*

The other case, *State v. Lara*, 2005 UT 70, 124 P.3d 243, dealt with a recall of a remittitur, which is arguably similar to a recall of a mandate. As part of its discussion, the Utah Supreme Court noted its reluctance to grant motions to recall a remittitur or a mandate:

> The narrow reading of the traditionally recognized grounds for recalling a remittitur and the reluctance by courts to apply them can be traced to the desire to discourage parties disappointed with the outcome of appeals from mounting attempts to undo a result long after a decision is handed down. Thus . . . an appellate court is without power to recall

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Appeals, or a justice or judge thereon may upon just terms stay the issuance of, or recall, any mandate of the Court of Appeals . . . .'" (quoting Colo. App. R. 41.1)).

> a mandate for the purpose of reexamining the cause on the merits, or to correct judicial error. We do not take issue with this statement of law. Indeed, a concern fundamental to our decisions in cases in which a defendant appeals after being barred from walking into the appellate court's front door is the fear that by penetrating the court's walls with too many side and back doors we may compromise the finality so essential to the integrity of the judicial process and lead appellate courts to overstep their jurisdiction.

Id. ¶ 19 (internal citation and quotation marks omitted). Ultimately, the Supreme Court held that a recall of the remittitur was proper in that case, but only because of the "important constitutional guarantees" (a criminal defendant's right to appeal) that were at risk if the remittitur was not recalled. *Id.* ¶¶ 19, 34.

Tucker and *Lara* clearly demonstrate that Utah appellate courts are averse to recalling a mandate except under the most limited circumstances. Unlike the *Lara* case, this case presents no important constitutional guarantees that override the general rule that appellate courts should not recall a mandate. Indeed, recalling the mandate in this case would be a realization of the *Lara* court's warning against opening up an appellate court's "back door" to litigants and "compromise[ing] the finality so essential to the integrity of the judicial process." *Id.* ¶ 19.

If the Dansies had any doubts or confusions about this Court's opinion when it was issued almost two years ago, they had two distinct "front doors" available to them under the Utah Rules of Appellate Procedure. First, they could have filed a Petition for Rehearing to raise the issue to this Court (just as the Association did with respect to the Court's decision regarding the issue of unconscionability). Nevertheless, the Dansies chose not to do so, thereby leaving this Court unaware of the issue. Second, the Dansies

could have raised the issue in their Petition for Writ of Certiorari. Again, they elected not to do so, thereby leaving the Utah Supreme Court unaware of the issue.

Now, after failing to take advantage of the "front door" rehearing and certiorari procedures, the Dansies are trying to enter this court through a "back door" request for a recall of mandate. The Dansies offer no explanation for why they should be allowed through the back door when they totally disregarded the wide-open front doors available to them. This Court should therefore follow its own precedent and the precedent of the Utah Supreme Court, and deny the Dansies' request for a recall of mandate.

B. This Case Does Not Meet the High Burden to Recall a Mandate.

As noted above, no appellate court in Utah has ever held that it has the "inherent power" to recall a mandate and modify an opinion following remittitur. Even assuming that this Court has the power to recall a mandate, the Dansies must still meet the high burden for such an extraordinary remedy. The Dansies do not meet this burden because there are no exceptional circumstances or grave injustice in this case.

As the Dansies acknowledge in their brief, courts that have recognized the power to recall a mandate repeatedly stress that it is a power that should be used only in the most exceptional of circumstances. *See* Brief of Appellants, page 14. The cases cited in the Dansies' brief are replete with limiting language. *See, e.g., Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) ("The power of a Court of Appeals to recall its mandate should be exercised in exceptional circumstances, such as to protect the integrity of its own processes, to prevent injustice, or for other good cause."); *Am. Iron & Steel*

Inst. v. EPA, 560 F.2d 589, 594 (3d Cir. 1977) (stating that a recall of mandate is "an extraordinary remedy" that should be "used sparingly" for "good cause, to prevent injustice, or in special circumstances," and that a court's discretion to recall a mandate should be used "only in unusual instances" (internal footnotes and quotation marks omitted)); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971) ("There must be a special reason, exceptional circumstances, in order to override the strong policy of repose, that there be an end to litigation." (internal quotation marks omitted)); *People v. McAfee*, 160 P.3d 277, 280 (Colo. Ct. App. 2007) ("[T]he power of an appellate court to alter its earlier judgment at this stage of the proceedings is limited to a showing of exceptional circumstances." (internal quotation marks omitted)).

Indeed, courts have held that finality of litigation is of such critical importance that mandates should not be recalled even if a court's decision is later determined to be wrong. *See, e.g.*, *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) ("If we were in error . . . we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute." (internal quotation marks and citation omitted)); *Greater Boston Television Corp.* 463 F.2d at 277 (stating that the power to recall mandates should not be used to change decisions "even assuming the court becomes doubtful of the wisdom of the decision that has been entered and become final"); *State v. Lara*, 2005 UT 70, ¶ 19, 124 P.3d 243 ("[A]n appellate court is without power to recall a mandate for the purpose of reexamining the cause on the merits, or to correct judicial error.").

The Dansies do not meet the high burden for a recall of mandate. They offer no explanation for their failure to seek review through the normal rehearing or certiorari procedures. It appears, however, that only two possible explanations exist. The first possible explanation is that the Dansies and their attorneys deliberately chose to not raise the issue on rehearing or certiorari. The second possible explanation is that the Dansies and their experienced and seasoned attorneys failed to recognize the issue until the time for rehearing and certiorari had passed. Neither of these possible explanations should be considered "exceptional circumstances."

If the Dansies deliberately failed to raise the issue on rehearing and certiorari, then they should not be allowed to now raise the issue through such an extraordinary remedy. The Utah Rules of Appellate Procedure provide rehearing and certiorari procedures to allow parties to seek redress at the appropriate time and stage of the case. Ignoring explicit procedural avenues for review in favor of a remedy that has never before been granted by a Utah court amounts to questionable legal strategy, not "exceptional circumstances."

Likewise, if the Dansies and their attorneys failed to recognize the issue before the case was remitted to the district court, such inattentiveness should not constitute "exceptional circumstances." Utah case law is replete with cases in which parties lose cases and are saddled with significant costs due to the error or neglect of the parties or their attorneys: appeals are dismissed for failure to file a timely notice of appeal, *see, e.g.*, *Henshaw v. Estate of King*, 2007 UT 378, ¶¶ 18-19, 173 P.3d 876; claims are disallowed for failure to follow statutory procedures, such as the notice of claim provisions under the

Governmental Immunity Act, *see, e.g.*, *Heideman v. Washington City*, 2007 UT App 11, ¶ 14, 155 P.3d 900; claims are dismissed for failure to exhaust administrative remedies, *see, e.g.*, *Patterson v. Am. Fork City*, 2003 UT 7, ¶ 21, 67 P.3d 466; and judgments are entered and enforced due to an attorney's neglect or negligence in responding to pleadings, *see, e.g.*, *Stevens v. LaVerkin City*, 2008 UT App 129, ¶¶ 26-32, 183 P.3d 1059. Any alleged monetary effect to the Dansies caused by their own negligence or the negligence of their attorneys to recognize the issue and utilize rehearing or certiorari procedures is not an exceptional circumstance that justifies the unprecedented remedy the Dansies now seek.

Nevertheless, the Dansies allege that "[a] great injustice will be done to [the Dansies] unless the mandate of this Court is recalled" and the opinion is modified. Brief of Appellants, page 15. In essence, the Dansies aver that their having to pay the connection fees and their pro rata share of costs of providing water are the "exceptional circumstances" justifying a recall of mandate. This is not the case, however, because the Dansies' paying their pro rata share of costs for water is far from unjust and, indeed, is inevitable as a result of the laws governing public utilities.

The district court's Final Judgment was based, in part, on a 1986 order of the PSC that construed the Well Lease Agreement as it related to the rates paid by Association members ("**1986 PSC Order**"). (R. Vol. 12, p. 1078-117.) The 1986 PSC Order was extremely critical of the Well Lease. *See, e.g.*, R. Vol. 12, p. 1088 (noting that the Well Lease Agreement was "grossly unreasonable, requiring not only substantial monthly payments, but also showering virtually limitless benefits on [the Dansies]"). The PSC

found that it was "unjust and unreasonable" to expect the Association's members to bear the entire burden of the Well Lease Agreement. (R. Vol. 12, p. 1091.) The PSC ordered that if the Dansies wanted to receive their water, they would have to pay "the actual, pro-rata (not incremental) costs for power, chlorination and water testing involved in delivering that water." (R. Vol. 12, p. 1092.) The purpose and effect of the 1986 PSC Order "was to prohibit the [Well Lease Agreement] from affecting the rates paid by [the Association]," which was "clearly within the PSC's rate-making authority." *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1023 (Utah 1995).

The Association offered on several occasions to supply water to the Dansies, provided that the Dansies pay their proportional costs, as provided in the 1986 PSC Order, but the Dansies refused to do so. (R. Vol. 14, p. 1767.) In 1994, the Association was forced to discontinue supplying water to the Dansies in order to comply with the 1986 PSC Order. (*Id.*) In 1996, the PSC concluded that the Association was exempt from PSC regulation because, as a result of the 1994 disconnection, the Association was providing water to only its members and a few others paying the same rates as its members. (R. Vol. 12, p. 1119-21.) Accordingly, the PSC cancelled the Association's certificate of convenience and necessity.[7] (*Id.*)

In the Final Judgment, the district court upheld the Well Lease Agreement and concluded that the Agreement was not void as against public policy. (R. Vol. 14, p.

[7] Private water corporations often seek an exemption from PSC regulation to avoid the expense of formal administrative tariff (i.e., rate) proceedings. The hallmark of whether an exemption is warranted is whether "each member enjoys a complete commonality of interest, as a consumer, such that rate regulation would be superfluous." Utah Admin. Code r. 746-331-1(C).

1766.) But the district court also imposed the conditions that were part of the 1986 PSC Order (i.e., that the Dansies were required to pay their pro rata shares of costs and their connection fees). This decision was based on the district court's prior conclusion that if the Association were to provide water to the Dansies, the Association would no longer qualify for PSC exemption, and the Association would again be subject to the 1986 PSC Order. In a Memorandum Decision and Order dated November 5, 2001, the district court held as follows:

> The decertification of The Association as a public water company was a result of the fact that if a water company is owned by all its members . . . then it is no longer subject to the Public Service Commission regulation. . . . If The Association were to provide water to the Dansies, who are not members of The Association and will not pay rates equal to that paid by members of The Association, it would no longer qualify for the exemptions [from PSC regulation] . . . and would then be subject to the Public Service Commission jurisdiction and its Order of March 17, 1986. (R. Vol. 11, p. 715.)

Thus, the district court had already concluded that if the Association were to begin providing water to the Dansies, the PSC would again have jurisdiction over the Association and the conditions of the 1986 PSC Order would again apply to the Dansies. The district court was therefore justified in imposing these conditions as part of the Final Judgment.

Similarly, if this Court were to modify its opinion and hold that the Dansies are entitled to free connections and water under the Well Lease Agreement, and if the Dansies connect their water system to the Association's water system to receive their free water, the Association will once again become subject to PSC regulation, and the 1986

PSC Order will again impose the payment conditions upon the Dansies. The Dansies would, therefore, be in the same position as they are now, which is that they are entitled to water and connections only if they pay their fair share. Thus, because the Dansies will be in the same position whether or not this Court modifies its prior opinion, there are no "exceptional circumstances" that necessitate or justify the Court to recall its mandate and modify its opinion.

In sum, it is doubtful whether this Court has the inherent power to recall a mandate, as no Utah appellate court has ever held that it does. But even if the Court does have the power to recall a mandate, this case is devoid of any exceptional circumstances that warrant the extraordinary relief requested by the Dansies. The Dansies had plenty of opportunity to raise the issue through the rehearing or certiorari procedures, but failed to do so. They now seek to enter the courtroom through an unprecedented back door and to disrupt the finality afforded by this Court's prior decision. Additionally, the Dansies will have to pay for the connection fees, transportation costs, and other costs—as provided in the 1986 PSC Order and the Final Judgment—even if this Court recalls its mandate and modifies its prior opinion. Thus, exceptional circumstances do not exist, and this Court should deny the Dansies' request that the Court recall its mandate.

CONCLUSION

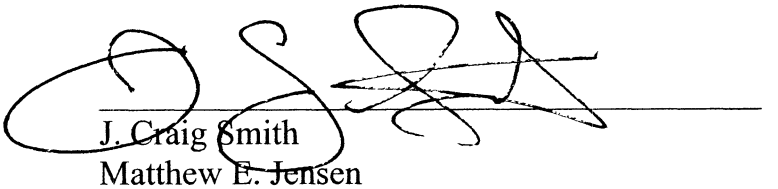
The district court properly denied the Dansies' motion to modify the Final Judgment because the district court lacked authority to modify the Final Judgment in the face of this Court's unequivocal affirmance. Additionally, the mandate rule precluded

the district court from modifying the Final Judgment as affirmed. Accordingly, this Court should affirm the district court's Order Denying Motion to Modify Final Judgment.

This Court cannot recall its mandate and modify its prior opinion because it lacks the authority to do so. But even if the Court does have the power to recall a mandate, this case does not present the exceptional circumstances that would be necessary to grant such an extraordinary relief. Accordingly, this Court should deny the Dansies' request that the Court recall its mandate.

Dated this 7th day of December, 2009.

SMITH HARTVIGSEN, PLLC



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CERTIFICATE OF SERVICE

On the 7th day of December, 2009, two true and correct copies of the foregoing **BRIEF OF APPELLEE** was mailed, first-class United States mail, postage prepaid, to:

J. Thomas Bowen
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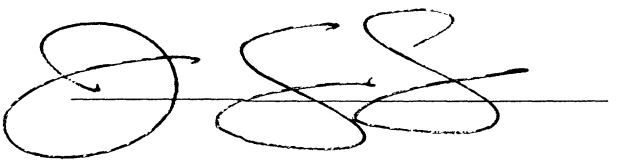
Suite D-102
Midvale, UT 84047



ADDENDUM

Tab A — Issue Statement from Brief of Appellants dated January 26, 2007 (Appellate Docket Number 20060139).

Tab B — *Tucker v. State*, 2005 UT App 28, 2005 WL 121439 (unpublished).

Tab A

IN THE UTAH COURT OF APPEALS

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation, , Plaintiff, vs. BAGLEY & COMPANY, a Utah corporation, J. RODNEY DANSIE, and GERALD BAGLEY, Defendants, FOOTHILLS WATER COMPANY, a Utah corporation, J. RODNEY DANSIE, THE DANSIE FAMILY TRUST, RICHARD P. DANSIE, BOYD W. DANSIE, JOYCE M. TAYLOR and BONNIE R. PARKIN, Counterclaimants and Appellants, vs. HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation, et al., Counterclaim Defendants and Appellee.	Utah Appellate Court Case No. 20060139 Third District Court No. 020107452

BRIEF OF APPELLANTS FOOTHILLS WATER COMPANY, J. RODNEY DANSIE, THE DANSIE FAMILY TRUST, RICHARD P. DANSIE, BOYD W. DANSIE, JOYCE M. TAYLOR AND BONNIE PARKER

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I. LIST OF PARTIES

The Appellants/Cross-Appellees are Foothills Water Company, J Rodney Dansie, The Dansie Family Trust, Richard P Dansie, Boyd W Dansie, Joyce M. Taylor and Bonnie Parkin (collectively "Appellants" or "the Dansies") These parties were the counterclaimants below

The Appellee/Cross-Appellant is Hi-Country Estates Homeowners Association ("Appellee" or "the Association"), the plaintiff and counterclaim defendant below

Bagley & Company and Gerald Bagley, the defendants below, are no longer parties to this action

II. JURISDICTION

Jurisdiction exists pursuant to Utah Code Ann § 78-2a-3(2)(j)

III. ISSUES PRESENTED FOR REVIEW

Issue No 1: Whether the trial court erred in holding that although the Well Lease provides that the Dansies are entitled to 55 water connections and up to 12 million gallons of water per year without charge, the Dansies must first pay for the connections as well as the Dansies' *pro rata* share of the transportation costs

The trial court's interpretation of the Well Lease presents a question of law that is reviewed for correctness *Hi-Country Estates Homeowners Ass'n v Bagley & Co* , 928 P.2d 1047, 1052-53 (Utah Ct App 1996).

This issue was preserved for appeal in the trial court. R. at 001764-001773

Issue No 2 Whether the trial court erred in holding that the Association did not breach its obligations under the Well Lease by severing the two water systems

The issue of whether the Association breached its obligations under the Well Lease is a question matter of law, reviewed for correctness *Peterson v Sundrier Corp* , 2002 UT 43, ¶ 14, 48 P.3d 918

Tab B

IN THE UTAH COURT OF APPEALS

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Jeff Tucker,

Petitioner and Appellant,

v.

State of Utah,

Respondent and Appellee.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20040814-CA

F I L E D
(January 21, 2005)

2005 UT App 28

Third District, Salt Lake Department

The Honorable Glenn K. Iwasaki

Attorneys: Jeff Tucker, Oxford, WI, Appellant Pro Se

Mark L. Shurtleff and Natalie A. Wintch, Salt Lake City, for Appellee

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Before Judges Billings, Greenwood, and Thorne.

PER CURIAM:

Jeff Tucker appeals a summary judgment disposing of his petition for extraordinary relief. In the original appeal from the dismissal of the petition, we reversed and remanded only insofar as the district court dismissed a claim that the parole revocation hearing was unreasonably delayed without good cause. See Tucker v. State, 2003 UT App 213. Tucker now seeks to appeal from the summary judgment order denying that remaining claim on its merits. This appeal is before the court on a sua sponte motion for summary dismissal.

The district court entered a ruling granting the State's summary judgment motion on March 30, 2004. Tucker filed an "Inquiry and Request for Clarification" on April 13, 2004, also requesting the district court to "toll" the time for appeal. Tucker filed his "Notice of Appeal With Memorandum in Support of Untimely Filing" on September 21, 2004, requesting the district court to accept the notice of appeal as timely. However, Tucker did not file a timely motion to extend the time for appeal under rule 4(e) of the Utah Rules of Appellate Procedure. See Utah R. App. P. 4(e) (allowing motion to extend to be filed in district court within thirty days after expiration of the original thirty-day appeal period). The request for clarification was not a motion tolling the time for appeal under rule 4(b) of the Utah Rules of Appellate Procedure.

A notice of appeal must "be filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order appealed." Utah R. App. P. 4(a). "If an appeal is not timely filed, this court lacks jurisdiction to hear the appeal." Serrato v. Utah Transit Auth., 2000 UT App 299,¶7, 13 P.3d 616. The only means to extend the time for appeal is through a timely motion filed in the district court under rule 4(e). The request to accept the untimely notice of appeal, which was filed almost five months after expiration of the time to file an appeal, was not timely under rule 4(e). Although an appellate court may review the trial court's determination of a timely rule 4(e) motion, it cannot consider a claim of good cause or excusable neglect in the first instance as a basis to exercise jurisdiction over an untimely appeal. See Utah R. App. P. 2 (precluding appellate courts from suspending or modifying rule 4(e)); see generally Reisbeck v. HCA Health Serv., 2000 UT 48, 2 P.3d 447 (reviewing decision on rule 4(e) motion).

Tucker also filed a "Motion for Recall of Mandate for Good Cause," which requests this court to set aside its decision on his original appeal in Case No. 20020191-CA. That case was resolved by our memorandum decision issued on June 26, 2003, see Tucker v. State, 2003 UT App 213, and this court denied a petition for rehearing on July 25, 2003. We lack jurisdiction to set aside our previous decision and do not consider the motion filed in this appeal from a completely separate decision.

Once this court determines that it lacks jurisdiction over an appeal, "we retain only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). Accordingly, we dismiss the appeal for lack of jurisdiction. We also deny the "Motion for Recall of Mandate for Good Cause Shown."

Judith M. Billings,

Presiding Judge

_____

Pamela T. Greenwood, Judge

_____

William A. Thorne Jr., Judge